United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1710

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P/S

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

PETER GRADOWSKI,

Defendant-Appellant

On Appeal from the United States District Court, Southern District of New York

BRIEF OF DEFENDANT-APPELLANT

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

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THE ISSUES PRESENTED FOR REVIEW

1. Did the Trial Court err in denying defendant's motion to suppress documents seized from defendant's automobile trunk without a search warrant by Special Agents of the Federal Bureau of Investigation?

(a) Did the Trial Court err in finding that bailees of defendant's automobile and automobile keys voluntarily consented to a search of defendant's automobile by the Special Agents, even though they gave the keys to the Agents shortly after having been told upon inquiry by them that "we do not use a search warrant" in searching for a fugitive?

(b) Did the Trial Court err in finding that the Special Agents had probable cause to search defendant's automobile trunk for evidence as to the whereabouts of defendant and the co-defendant Richard Nash?

(c) Did the Trial Court err in finding that the search and seizure of documents from defendant's automobile trunk without a warrant were justified by exigent circumstances?

(d) Did the Trial Court err in failing to address itself to defendant's contention that the Special Agents conducted an impermissibly general search, seizing indiscriminately a group of documents including many that had no bearing on the whereabouts of defendant and Nash and that the Special Agents at the time of the search were unable to identify as contraband or evidence, instrumentalities or fruits of a crime?

2. Was the receipt in evidence of documents seized from defendant's automobile trunk without a warrant prejudicial to defendant, resulting in reversible error?

Statement of the Case

1. Nature of the Case

Defendant-appellant Peter Gradowski ("defendant") appeals from a judgment of conviction entered on May 17, 1974 by United States District Judge Harold R. Tyler sentencing defendant to serve a term of imprisonment of fifteen months and to five years' probation, after a jury trial before Judge Tyler had resulted in verdicts of guilty on seven counts of the indictment on October 19, 1973.

2. The Proceedings and Dispositions Below

Indictment 73 Cr. 841, in twelve counts, was filed on September 4, 1973, charging defendant and the co-defendant Richard Nash jointly in eleven counts, and each defendant separately in two respective counts. A motion to suppress documents seized from defendant's automobile had previously been made by the co-defendant Nash, in connection with an earlier, superseded indictment (73 Cr. 610), and a hearing held by Judge Tyler on July 16 and 17, 1973. Judge Tyler denied Nash's motion to suppress on July 17, 1973, in an opinion delivered from the bench. A defendant was arrested on September 13, 1973. Defendant's motion to suppress the same documents

was thereafter made upon the record of the hearing held on Nash's motion to suppress and was denied by Judge Tyler in a written opinion dated October 23, 1974.

The trial commenced on October 16, 1973 and lasted four days. Defendant was sentenced by Judge Tyler on November 23, 1973 pursuant to the provisions of Title 18, United States Code, Sections 4208(b) and (c) to the maximum terms of imprisonment on each of the seven counts on which he was found guilty, and committed to the custody of Bureau of Prisons for study, with a request that the study and report be returned within sixty days of the judgment of conviction. After commitment of defendant to the Bureau of Prisons facility in Springfield, Missouri and receipt by the Court of the study requested, the Court entered its definitive sentence of May 17, 1974, from which this appeal is taken.

Defendant is presently serving his sentence of imprisonment.

Statement of Facts

1. The Offenses Charged in the Indictment

The indictment charged that from September, 1972, to April 14, 1973, defendant and Nash devised a scheme to

defraud The Chase Manhattan Bank, N.A., ("Chase"), Franklin National Bank ("Franklin") and Bankers Trust Company ("Bankers Trust") and other unnamed banks and to obtain money and property from them by means of false and fraudulent pretenses, representations and promises.

Specifically, the scheme charged was that defendant and Nash would obtain printed checks designed by Chase for use by two corporations, knowing the checks to have been stolen, and would cause the checks to be made out to the order of two fictitious persons, Gary Essig and Murray Fischer: two checks in the respective amounts of $106,575.00 and $38,750.00 to the order of Essig, and two checks in the respective amounts of $177,588.75 and $42,625.00 to the order of Fischer.

The indictment further charged that the defendants opened a checking account in the name of Essig at Chase and another at Franklin, and one such account in the name of Fischer at Bankers Trust.

Counts One through Four charge that the defendants possessed the four checks referred to above, the two checks in larger amounts on December 1, 1972 and the two checks in smaller amounts on December 5, 1972, knowing the same to have

been stolen from Chase, in violation of Title 18, United States Code, Section 2113(c) and 2.

Counts Five through Ten are mail fraud counts, charging that in furtherance of the scheme the defendants caused Chase, Franklin, Bankers Trust and Irving Trust Company to send certain letters to an addressee called "Intertran", in New York City, (Counts Five, Seven and Eight) and in one instance to the attention of one "Luiz Osorio" at Intertran (Count Six). Count Nine charges that the defendants caused a mailing of a letter from "Intertran, Inc." to Bankers Trust; Count Ten charges that the defendants caused Franklin to mail a letter to Essig at an address in New York City. The mailings were alleged to have taken place during the period from November 14, 1972 to late November or early December, 1972. The statutes alleged to have been violated are Title 18, United States Code, Sections 1341 and 2.

Count Twelve charges that defendant used the fictitious name Murray Fischer in furtherance of the alleged scheme to defraud and the alleged mail fraud, in violation of Title 18, United States Code, Section 1342. *

The jury found defendant guilty on Counts One through Four, Seven, Nine and Twelve. Defendant was found not guilty on Counts Five, Six and Ten.

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* Defendant was not named in Count Eleven.

2. The Proof at Trial

The Government called witnesses from Chase, Franklin. Bankers Trust and Irving Trust, three answering services, the brokerage firm of Hentz & Co., and defendant's brother-in-law Kevin Tighe. Four Special Agents of the Federal Bureau of Investigation ("FBI") testified about certain statements imputed to defendant and certain documents seized from his person and from his automobile (the latter being the subject matter of this appeal). The Government also introduced evidence of a "similar act" occurring after the events charged in the Indictment, involving a stolen check that defendant allegedly deposited and drew upon in a Miami bank opened in the name of an alias.

The only non-FBI Agents who testified about the events charged in the Indictment who had ever met or spoken to defendant were Aloysius C. Tattam of Bankers Trust, Jerome Marshal Cinnamon of Hentz & Co. and Kevin Tighe.

Tattam testified that defendant opened an account in the name of Log Press Company of 51 E. 42nd St. in New York City on November 15, 1972, giving his name as Murray Fischer and his residence address as 200 W. 20th St., New York City. Defendant gave the name "Intertran" as a reference, located at

133 E. 58th St., New York City. On November 27 or 28th, Intertran sent a letter to Bankers Trust signed by "Luiz Osorio", stating that Murray Fischer had been in their employ for some 21 years, was a loyal employee and they regretted to lose him. There were deposits of $500, $900, $177,588.75, and $42,652. On December 6, 1972, defendant presented a check drawn on the Log Press Account in the amount of $16,500 payable to the order of Murray Fischer for certification, but Tattam refused to certify it. On December 8, 1972, a check was presented for $175,000 payable to H. Hentz & Co. which the Bank returned unpaid. (Tr. 22-26)*

On cross-examination of Tattam it was brought out that although he had picked out defendant at a line-up shortly before the trial as the person who he "believed" was the person who had opened up the account in the name of Murray Fischer, he had told two Special Agents of the FBI on December 14, 1972 that he was "not sure" whether a photograph of defendant exhibited to him with a group of other photographs represented "Murray Fischer".

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* References in form "Tr." are to pages of the trial transcript. References to pages followed by the letter "a" are to pages of defendant's appendix.

Further doubt was case on the identification of defendant by the fact that the "Murray Fischer" had a full beard when he transacted business at the bank, and by Tattam's mistaken statement that the person portrayed in the photograph of defendant shown to him on December 14, 1972 did not have a mustache. (Tr. 35, 36, 38, 40, 42).

Jerome Marshall Cinammon testified that in the fall of 1972 he was a registered representative at H. Hentz & Co. in New York City and that on December 5, 1972, defendant came to his office accompanied by an attorney named Stanley Cohen of the law firm of Cohen, Cooper, Wallach & Condon at 15 Park Row, New York City. Defendant introduced himself as Murray Fischer and Cohen used his real name. They opened a joint account to trade in commodities, and presented two checks, one in the amount of $175,000, and the other in an undetermined amount that Cinammon did not accept because it was not made out by Murray Fischer. The $175,000 check was drawn on Bankers Trust Company. On December 8, 1956, Hentz & Co. purchased some South African gold stocks for the account. On December 7 Cohen came in with a certified check in the amount of $100,000 made out by Gary Essig to the order of Murray Fischer and endorsed by Murray Fischer to H. Hentz & Co.

On cross-examination Cinammon stated that he had previously had telephone conversations with Cohen on four or five occasions, and was satisfied from those conversations and a bank reference that he, Cinammon, had complied with the "know your customer" rule of the brokerage business with respect to Cohen. Since Cohen appeared to him to be a reliable individual, he did no checking-up on Murray Fischer's identity. (Tr. 51, 53, 56, 57, 64, 65).

Kevin Tighe, a New York City fireman, testified that sometime in late 1972, he played checkers on two occasions with defendant, his brother-in-law, at Tighe's home. On the first occasion, defendant told Tighe that he:

> "...Had a big deal going on, or a big operation."

On the second occasion defendant stated:

> "...That the big operation had fell through and that
>
> "...There was a black person involved that was to put some article in a place where it would be accessible, and that the operation had failed and he was clear of it, or was not involved and that they were holding an attorney.
>
> "...The part of the black person was to put some article in an area where it would be accessible." (Tr. 71-72).

Special Agent Lee Norton of the FBI, the case agent on the case, testified that he was present on September 13, 1973, at an interview of defendant conducted by Thomas Day Edwards, Chief of the Criminal Division, United States Attorney's Office, Southern District of New York. The interview was held in Mr. Edwards' office while defendant was under arrest. Defendant stated at that time that he knew Stanley Cohen and had met him on a brief occasion or occasions with Nash, but that he did not accompany Cohen to H. Hentz & Co. and open up an account using the name Murray Fischer. Defendant stated that he was aware that a warrant had been issued for his arrest but he claimed that he didn't have any knowledge as to why the warrant was issued. Defendant, according to Agent Norton, at some point denied knowing Cohen but then explained that he had been present at a bail application by Nash in Queens when Cohen was there, and that he had been at the office of Cohen and Cohen's then partner, Gene Condon, who was Nash's attorney. Defendant also stated that he had used the name William Dolman. (Tr. 177, 178, 195-96 and 263).

Special Agent Anthony Scuderi of the FBI testified that after placing defendant under arrest on September 13, 1972, defendant told him that he knew that there was an arrest warrant outstanding for him, and that this was the reason he

traveled outside the state in the company of Nash to Florida and places west in defendant's 1968 green convertible Cadillac. Defendant also stated that he had used the name William Dolman. (Tr. 163).

The similar act proof was introduced by W. Bedford Price, Assistant Vice-President of the City National Bank of Miami, who testified that in January, 1973, defendant opened an account at his bank under the name William Dolman, in the name of Dolman Enterprises located at an address in Miami, furnishing various pieces of identification, and the name of Joseph Mayer, an attorney, as a reference. There was a cash deposit of $500, a second deposit of $3,860.00, a withdrawal of $450 and a check drawn in the amount of $3,800. Price told defendant initially that the check for $3,800 could not be paid since the deposit hadn't yet cleared, but defendant subsequently came after the funds had "cleared" and Price approved the check for payment. Price testified on cross-examination that he had checked none of the references presented by defendant because he considered the account "...to be reasonably well identified and I went on to other business." Finally, Bruce Jed, a broadcast consultant, testified that the check deposited in the City National Bank of Miami was forged. (Tr. 240-42, 247, 256 and 264).

The Government called the following witnesses who testified to transactions in which Nash and not defendant was present, or in which no identification at all was attempted:

Witness	Company	Person Identified
Harold Trock	Allied Telephone Answering Service	Nash
Nancy Russo	Silver Secretarial Service Inc.	Nash
Evelyn Boone	Complete Business Answering Service	None
Robert H. Ray	Franklin	Nash
Ellen O'Neill	Chase	None
Donald Schmit	Irving Trust Co.	None

The only direct evidence linking the testimony of these witnesses to defendant consisted of the various documents seized from his automobile by Special Agents of the FBI as described below. These documents were as follows:

Witness	Document
Harold Trock	Invoice to Gary Essig (GX.4)*
Evelyn Boone	Account Card of Murray Fischer (GX.5)
Robert H. Ray	Envelope addressed to Gary Essig (GX.8)
Ellen O'Neill	Letter to Intertran (GX.30)

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* References in the form "GX" are to Government Exhibits received in evidence.

In addition the following other documents seized from defendant's automobile were offered and received in evidence:

Exhibit	Description
2-A	Invoice from Silver Secretarial Service addressed to Intertran, Inc., Luiz Osorio.
2-B	Invoice from Silver Secretarial Service addressed to Intertran, Inc., Luiz Osorio.
4	Invoice from Allied Telephone Answering Service indicating "paid 10/31/72", $20.00.
5	Receipt of Complete Business Service to Murray Fischer for $15.00.
8	Receipt for $100 deposit on 11/22/72 at Franklin.
10	Envelope and letter from Franklin to Gary Essig, 200 W. 20th St., New York, New York.
13	Franklin deposit slip in the amount of $38,750 for account of Gary Essig.
15	A group of blank deposit slips drawn on Franklin.
25	Check made out to Murray Fischer to the order of Murray Fischer for $16,500 drawn on Bankers Trust Co.
26	One blank deposit slip from Bankers Trust Co.
27	A number of blank deposit slips from Bankers Trust Co.

Exhibit	Description
30	Signature letter from Chase signed by Ellen O'Neill addressed to Intertran, 133 E. 58th St., New York.
37	Chase deposit slip in the amount of $38,750 dated 12/5/72 for the account of Gary Essig.
38	A group of blank checks and blank deposit slips of Chase.
70	Card of Donald R. Schmit, Irving Trust Co., One Wall Street.
71	Notebook
74-C	Check to Gary Essig, 200 W. 20th St., New York, New York, in the amount of $106,575.00.
74-D	Check payable to the order of Murray Fischer in the amount of $177,588.75.

3. The Proof at Nash's Motion to Suppress

Sometime prior to February 6, 1973, federal arrest warrants were issued for the arrest of defendant and Nash in connection with the alleged bank scheme. On or shortly prior to February 6, 1973, Special Agents Anthony Scuderi and Richard McMullen of the FBI received instructions to follow up a lead in the search for defendant and Nash, after a request for assistance in locating them had been forwarded to the FBI office in Babylon, Long Island. Agent Scuderi explained generally to Agent McMullen the nature of the case telling him that it concerned a scheme to defraud banks. Neither Agent Scuderi nor Agent McMullen had any responsibility for investigating the facts of the case itself -- their role was limited to assisting in the attempt to apprehend the named defendants. On February 6, 1973, Agents Scuderi and McMullen went to the home of Mr. and Mrs. George Hammer at 41 Beach Street, Sound Beach, Long Island, New York. Mrs. Hammer is Nash's sister. (44a; 54a-56a).

On the occasion of their visit to the Hammer residence on February 6, 1973, the Agents spoke only to George Hammer, and advised him at least once of the import of the federal statute that makes it a crime to harbor a fugitive from justice. Mr. Hammer told the Agents that either defenor Nash owned a Cadillac, but no other concrete leads were developed. (105a; 106a).

In the afternoon of April 13, 1973, the two Agents returned to the Hammer residence in an official FBI car, pulled into the driveway, and noticed a green Cadillac convertible parked at the rear of the property. Mr. Hammer approached the Agents holding a dog on a leash, and Agent Scuderi explained that he wished to interview Mrs. Hammer about the whereabouts of her brother. Mr. Hammer replied that he and his wife had retained an attorney and that they declined to be interviewed. Agent McMullen interjected a question about the ownership of the Cadillac, to which Mr. Hammer replied that it belonged to a friend. Mrs. Hammer then put her head out the back of the house, and Agent Scuderi told her that he wanted to talk to her about her brother, whereupon both the Hammers replied that upon the advice of counsel they did not wish to discuss this matter, declining to identify the attorney they had retained. (42a-44a; 86a).

The Agents suspected that at that moment defendant and Nash were in the house because of the presence of the car that had not been there before, and because it is unusual for persons to retain an attorney and decline to cooperate with the FBI. On this occasion as well, the Agents warned the Hammers, at least once, that harboring a fugutive was a federal crime. (66a; 67a; 105a).

Agent McMullen made a notation of the license number of the Cadillac, and the Agents left. While driving

away, they tried unsuccessfully to reach the FBI by radio in New York City and in Babylon in an effort to find out to whom the Cadillac belonged. (43a; 44a).

The Agents drove to the headquarters of the 6th precinct of the Suffolk County Police Department located in Coram, New York, where Agent McMullen called the Department of Motor Vehicles and found out that the Cadillac was indeed registered to defendant. The Agents advised the Suffolk County detectives of their belief that the defendants were in the Hammer house, and the detectives volunteered to help the FBI apprehend them. The Agents requested that a "sector" car be sent to prevent the Cadillac from leaving the Hammer premises while the Agents and detectives sped to the scene. (44a; 45a).

The Agents followed a detectives' car to the Hammer house, and upon returning, Agent McMullen asked Mr. Hammer why he hadn't told them whose car the Cadillac was. Mr. Hammer replied that he thought the Agents knew whose car it was.* Agent McMullen pointed out that it was obvious that he had not known whose car it was since he had asked Mr. Hammer to supply this information. (46a).

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* Mr. Hammer was probably assuming that the Agents had recalled their conversation of February 6, 1973, when Mr. Hammer had said that either defendant or Nash owned a Cadillac.

The following conversation then occured:

[on direct examination of Agent McMullen]

"We [the Agents] then advised Mr. Hammer that we would like to conduct a search of the house for Gradowski or Nash. Mr. Hammer asked if we had a search warrant. He was advised by myself [McMullen] that in an instance where the individuals are fugitives from justice and we have probable cause to believe that they are in a location, we do not use a search warrant.

* * * *

". . . he said 'All right,', he said, I assume that -- words to that effect, . . ., that "I assume that you know the law. I am not familiar with whether you need a search warrant or not.' so he said okay." (46a). (emphasis supplied). (See also 96a; 97a).

The Agents then asked Mr. Hammer to accompany them through the house, which he did, taking them throughout all the rooms, closets and basement. Defendant and Nash were nowhere to be found. (46a).

Upon returning to the kitchen area, the Agents asked Mr. Hammer how he had obtained possession of the car. Mr. Hammer explained that the evening before someone who identified himself as "Jack" had asked for Mr. Hammer's permission to bring the Cadillac to the Hammer property. Mr. Hammer had agreed, and "Jack" brought the car which he parked to the rear of the property, leaving the keys with Mr. Hammer. (47a; 123a; 124a). The following conversation then occured:

"At this point I [Agent McMullen] said to Mr.

Hammer I would like to search the Cadillac, and he turned to his wife and said, 'Get the keys'. Mrs. Hammer got the keys of the Cadillac, gave them to Mr. Hammer. Mr. Hammer gave them to me, and I proceeded to search the Cadillac." (47a; 86a-88a).

After obtaining the keys and approaching the Cadillac, the Agents noticed an unrolled sleeping bag in the back seat, parts of uneaten food on the floor, half a cup of coffee apparently from a "take-out" diner and a box containing papers and napkins from a restaurant like McDonalds. Agent McMullen then proceeded to search the car, while Agent Scuderi accompanied two detectives to another location nearby. (48a; 49a).

In conducting his search of the car, Agent McMullen was looking for evidence that would lead to the location of the two defendants. The Agents had not received any information that there would be anything in the car relating to the crime charged. (72a; 73a; 89a; 90a). Agent McMullen did not attempt to identify in his search items that might have been instruments or evidence of the crime charged. He described the conduct of the search as follows:

[on direct examination]

* * *

The articles I took from the car were documents,

paper documents which I had found in the car and in the trunk of the car, and I gathered them up and, not being well acquainted with the details of the case, I really didn't know what was really important. (48a; 49a).

* * *

[on cross examination]:

Q You opened the trunk?

A Yes, I did.

Q Was the trunk all full of stuff including what is listed on the schedule here, or was that the only thing in the trunk?

A There was a lot of stuff in the trunk.

Q So that you sifted through and picked that out?

A Well, as what I say, there was a lot of stuff in the trunk. * * * . . . and some stuff, a bunch of papers. I just gathered up all the papers in the trunk.

Q You gathered them up?

A Right. (74a).

* * *

THE COURT:

When you opened up that trunk, did you have occasion to see the nature of any of the documents or their apparent nature as they appeared?

THE WITNESS:

To the best of my recollection, the documents that were so important to me when I opened the trunk were documents pertaining as to the location of the fugitives. I found a repair order for their car that the car had been repaired, I believe, in Las Vegas, Nevada, a couple of weeks before. I thought that was interesting as to a possible lead as to where they were and where they may have been.

The other material I didn't pay attention other than I was looking for specific location. I just threw them in the envelope.

THE COURT:

Without checking any notes or anything, do you recollect seeing anything at the time which purported to be documents emanating from a bank, either in the sense of internal bank records or the kind of bank records that individual depositers would have at a bank?

THE WITNESS:

No, I can only say I don't recollect seeing those documents at the time. (77a-78a). (emphasis supplied).

After collecting all the documents in a red Manila envelope he had found in the car, Agent McMullen handed them over to Agent Scuderi, who had just returned to the Hammer premises. Agent Scuderi took them without attempting at that time to segregate the portion in which he might be interested. (49a; 79a; 98a; 108a).

After the search and seizure were completed, Agent McMullen told the Hammers that the Agents were taking the materials they had found, whereupon Mr. Hammer said:

"Look, I want you to take the keys of this car. I want you to take the car.
***I don't want anything to do with it. I am not involved with these individuals, and they have caused me enough trouble.
***Here are the keys to the car, and I would like you to remove the car from my property. (50a).

Agent Scuderi took possession of the keys and gave Mr. Hammer a receipt for them. At some later time the car was removed

from the Hammer property and taken to a home nearby occupied by Mr. Gradowski's mother. (52a). The keys were returned to Mr. Hammer on April 27, 1973. (91a).

Inasmuch as the Agents considered the case to be a federal violation, they never considered the possibility of securing a search warrant for the car from a state or local magistrate, and apparently gave little or no consideration to the possibility of obtaining a federal search warrant. (61a-63a).

4. Findings and Conclusions of the Court

The Court's findings of fact and conclusions of law were delivered orally on the record at the conclusion of the second day of the hearing, on July 17, 1973. While the findings and conclusions pertain only to Nash's motion, they are described below because they form an essential background to Judge Tyler's later opinion entered on October 23, 1973, denying defendant's suppression motion.

(a) Consent to Search the Car

The Court found that the Hammers had not given a valid consent to the Agents for the search of their home, but that they had voluntarily consented to the search of the car. (70a; 80a; 155a). With respect to the search of the house, the Court observed in colloquy after the close of the testimony on July 16, 1973 that the Hammers were "...bamboozled into thinking that that was that [Agent's McCullen's version of the law] and they had to consent." (155a).*

* Judge Tyler changed his view on the legality of the search of the home in his opinion of October 23, 1973 (21a).

As to the car, the colloquy was as follows:

MR. BUSH:

> *** "While the Hammers may not have been too pleased to have the FBI into their house, they certainly evidenced a different feeling with respect to the car." (162a).

THE COURT:

> "...There is some evidence post the actual search which tends to corroborate that." (162a). (emphasis supplied)

MR. BUSH:

> Both the giving of the keys and insisting that the agents keep the keys and the fact that the car was then moved off after the search. (Ibid)

THE COURT:

> Right, I understand that. (Ibid)

In reviewing the evidence on the day following the testimony, the Court stated that it was not satisfied that Agent McCullen's explanation of the asserted right of the Agents to search the house without a search warrant "...comported with the law..." (181a). The Court found that "McCullen...asked George for permission to search the car", and that "...the Hammers at this point were

more than ready to turn over the keys and did so with alacrity." (182a). With respect to the search of the car, the Court stated its formal conclusions as follows:

> "However, I do not think that I can conclude that the illegality of the house search tainted the search of the car. First of all, I note the obvious, that a car and a home are quite different animals within the purview of the Fourth Amendment to our Constitution.
>
> Second of all, I note that, if you analyze what the Hammers said, both before the search was actually conducted of the car and after, that they having been given full custody of the car, were very anxious to have the search of the car conducted and have the car gotten off their hands, and I for one don't blame them. They were doing their best to protect Richard Nash, but blood can only be stretched so far, and the ties of relationship by marriage can only be stretched a little less far.
>
> Therefore, I think that it is important to keep those circumstances in mind. I also think it's important to keep in mind the nature of this automobile. I also think it is important to keep in mind that here the agents made no statements as to the law and did nothing to mislead the Hammers on that score.
>
> It is true that there is no testimony that either one of the agents said in substance to the Hammers that they had the right to not consent to the search. On the other hand, I think that circumstances or fact does not negate the reasonableness of concluding that the Hammers for every good reason wanted to consent to that search, hoping to get rid of the FBI agents and the car in one fell swoop as a result thereof." (Tr. 192a-193a; emphasis supplied).

(b) Standing of the co-defendant Nash

The Court held that the co-defendant Nash "probably" did not have the requisite standing to challenge the search of the car. However, the Court noted that the matter "...is not free from doubt"; accordingly, the Court went on to consider the other constitutional issues raised by the motion to suppress, for the convenience of any reviewing Court that might hold a different view as to the issue of standing. (191a).

(c) The Warrantless Search

The Court held that the FBI Agents had probable cause to search the car for evidence of the whereabouts of the defendants, relying particularly upon the fact that as he approached the car Agent McCullen observed various indications, such as the half-filled coffee cup, that the defendants had recently been in the car.

Having thus found the existence of probable cause, the Court held that the Agents were justified in conducting an immediate search without trying to get a search warrant. The Court noted that a car can be moved quickly, and that the Hammers had been "...willing to tell

a few little fibs in order to protect their brother-in-law..."; (194a) and that

> "even if they were to use the County Police to block off the roads, that it was still very possible that a desperate man or men could extricate themselves through some kind of slip or breach in the net. (Ibid).

For the foregoing reasons, the Court denied Nash's motion to suppress. (195a).

5. The Court's Opinion on Defendant's Suppression Motion

Defendant briefed the search and seizure issue on the basis of the factual record established in the hearing held on Nash's motion. On October 23, 1973, the Court entered its opinion denying the suppression motion. (12a). The Court found that the consent of the Hammers was voluntarily given, because Mr. Hammer simply turned to his wife and said "Get the keys" after being told that the Agents wished to search the car, and because of the conversation that followed the search when Mr. Hammer stated:

> "Look, I want you to take the keys of this car. I want you to take the car....I don't want anything to do with it. I am not involved with these individuals, and they have caused me enough trouble....Here are the keys to the car, and I would like you to remove the car from my property." (19a).

The Court rejected defendant's argument that the Agents' prior claim of authority to search the house without a warrant was the fact that precipitated Mr. Hammer's prompt delivery of the keys. The Opinion did not specifically address this issue, however. (20a-21a).

The Court also found that the Hammers had authority to consent to the search, an issue that defendant did not contest. (21a-22a).

Finally, the Court decided that under the "automobile exception" to the warrant requirement, the Agents were justified in searching the car by exigent circumstances: recent occupation of the car by someone, perhaps one or both of the defendants; the delay that would be occasioned by applying for a warrant; the mobility of the car and possible destruction of its contents during the agents' absence; and that the fact that the defendants had been "eluding the FBI for a number of months." (23a).

Importantly, the Court did not address at all the issue of probable cause for the Agents to search the trunk of the automobile, although the Court had done so in its oral opinion on Nash's motion and had found that there was probable cause. (23a, 24a, 194a, 195a). Nor did the Court reach the issue of the sweeping generality of the search, in which all documents in the trunk were picked up at once without any determination by Agent McMullen as to the significance of any of them as contraband or evidence, fruits, or instrumentalities of a crime.

ARGUMENT

POINT I

THE HAMMERS' DELIVERY OF THE KEYS TO THE AGENTS WAS NOT VOLUNTARY BUT WAS A RESULT OF THE AGENTS' CLAIM OF LAWFUL AUTHORITY TO SEARCH FOR FUGITIVES WITHOUT A WARRANT

In finding the delivery of the keys to the Agents to have been a voluntary act within the meaning of the decisions that have dealt with consent searches, the trial Court pointed out that the Hammers:

> "...had experienced prior contact with these same agents and had felt free on a previous occasion to refuse requests of the agents pursuant to the advice of counsel." (20a).

The Court's opinion overlooks the crucial fact that shortly before on the same day of the search, Mr. Hammer asked if the Agents had a search warrant for the house, was told that "we do not use a search warrant", and replied "all right...I assume you know the law." (96a) The Hammers, who had retained counsel, were obviously desirous of exercising all the rights available to them, but were told that they had no right to resist a search. The words used by Agent McMullen about the car: "I would like to search the Cadillac" paralleled exactly

the words used earlier by the Agents with reference to the house: "We would like to search the house." (182a; 47a; 46a).

The case is controlled by Bumper v. North Carolina, 391 U.S. 543 (1968), where the Court struck down a purported "consent" search in which the officers told Mrs. Bumper they had a search warrant to search her house. The Court held that the burden is on the prosecution to prove that consent to a search was voluntarily given, and that:

> "This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." 391 U.S. at 548-49.

The Court pointed out that a claim of authority to search is tantamount to announcing that the person addressed has no right to resist, as a result of which any consent must be held to have been coerced. 391 U.S. at 550.

In United States v. Hart, 359 F. Supp. 835, 847, (D. Del. 1973) Judge Latchum held a warrantless search of a firearms dealer's premises by Agents of the Treasury Department to have been unconstitutional because:

> "While Droze [the Agent] made no specific announcement of statutory authority, by virtue of his previous course of dealing with the Harts, his authority was implicit. When Droze

> entered the premises cloaked with that implicit authority, it was tantamount to an announcement that the occupant has no right to resist. This implicit coercion renders nugatory any apparent consent. See Bumper v. North Carolina, 391 U.S. at 550, 88 S. Ct. 1788; cf. Smith v. Rhay, 419 F. 2d 160 (C.A.9, 1969).

In Schneckloth v. Bustamonte, 412 U.S. 218, 233 (1973), the Court expressly reaffirmed the reasoning and holding of Bumper, when it stated:

> "Conversely, if under all the circumstances it has appeared that the consent was not given voluntarily -- that it was coerced by threats or force, or granted only in submission to a claim of lawful authority -- then we have found the consent invalid and the search unreasonable. See, e.g., Bumper v. North Carolina, 391 U.S., at 548-549...." (emphasis supplied)

In the case at bar it is not surprising that Mr. Hammer did not again inquire as to the state of the law regarding search warrants for cars -- he had every reason to conclude that Agent McMullen would "like" to search the car because, as in the case of the house, he claimed lawful authority to do so. The peremptory nature of the words he used, and his failure to request permission to search the car, created an impression

of both authority and command, amounting to coercion as the Courts have used the word in this context. See also United States v. Mapp, 476 F. 2d 67, 78 (2d Cir. 1973).

Further, the Court erroneously concluded that there was evidence of a more voluntary attitude on the Hammers' part about the search of the car than about the search of the house. The Hammers' complaint attitude about the car did not arise, however, until after the search and seizure had been completed, at which time all the materials had been gathered from the car and there was no longer any purpose in the Hammers' continuing to conduct themselves in a guarded manner. Accordingly, the Hammers' post-search conduct is not at all inconsistent with the coercive nature of the circumstances that led to the turning over of the car keys.

Significantly, neither of the Agents requested the Hammers to execute the FBI "Consent to Search" form commonly used in consent situations, nor did the Agents otherwise ask the Hammers to furnish a written record of their supposed acquiescence in the Agents' conduct. The Agents' failure to try to obtain such evidence of consent is further corroboration of the fact that both searches were conducted not on the basis of voluntary consent but on a claim of lawful authority by the Agents.

POINT II

THERE WAS NO PROBABLE CAUSE TO SEARCH THE TRUNK OF THE CAR

The Fourth Amendment states as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person, or things to be seized. (emphasis supplied)

In Brinegar v. United States, 338 U.S. 160, 175 (1949), the Court stated:

> "The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt." McCarthy v. De Armit, 99 Pa. St. 63, 69, quoted with approval in the Carroll opinion. 267 U.S. at 161. And this "means less than evidence which would justify condemnation" or conviction, as Marshall, C. J. said for the Court more than a century ago in Locke v. United States, 7 Cranch 339, 348. Since Marshall's time, at any rate, it has come to mean more than bare suspicion: Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. Carroll v. United States, 267 U.S. 132, 162. (emphasis supplied)

The facts known to the Agents in this case were sufficient to support only "bare suspicion" on their part. Agents McMullen and Scuderi did not have any information that anything related to the alleged crime would

be in the car. Their observation of indicia of recent occupation of the car by the defendants did not justify a belief that a "particular. . . thing[]" pertaining to the whereabouts of the defendant would be in the car. Indeed, the Agents could not have "particularly describ[ed]" anything that they were looking for, since they knew nothing about the contents of the car other than what was in plain view from the outside. The objects that were in plain view did not give rise to an inference that any other "particular thing" would be located elsewhere in the car. Thus, if the Agents had been asked by a Magistrate to list the "particular things" they had probable cause to look for in the car, they could only have speculated on an infinity of possible items that might or might not have been there. Since probable cause is necessary to justify the search of a vehicle as well as a dwelling place, the bare speculation of the Agents in this case does not suffice, and the search was invalid for lack of probable cause. See Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973); Dyke v. Taylor Implement Co., 391 U.S. 216, 221 (1968); Preston v. United States, 376 U.S. 365 (1964); United States v. Cohen, 358 F. Supp. 112, 123 (S.D.N.Y. 1973).

POINT III

EVEN IF THERE WAS PROBABLE CAUSE TO SEARCH THE CAR, THERE WAS NO EXIGENT CIRCUMSTANCE JUSTIFYING THE FAILURE TO OBTAIN A SEARCH WARRANT

After Agents McMullen and Scuderi returned to the Hammer premises with police reinforcements and had fully searched the house, it was clear that the defendants were not at the scene and thus were not in a position to take control of the car or to take or destroy any of its contents. Moreover, the Hammers, while protective of the defendants and uncooperative with the Agents, had nevertheless offered no resistance to the search of the house and would certainly not have attempted to overcome the Agents or police by force in order to tamper with the contents of the car. In brief, it was entirely practicable for the Agents to try to procure a search warrant while leaving a guard at the car to safeguard its contents. Such a minimal intrusion into the privacy of the vehicle would have assured the safety of the evidence while protecting the greater constitutional interest of its owner in having the facts supporting the alleged probable cause presented to a neutral and detached magistrate.

Until the decision of the Supreme Court in Coolidge v. New Hampshire, 403 U.S. 443 (1971), it appeared that a series of decisions culminating in Chambers v. Moroney, 399 U.S. 42 (1970) had effectively deleted from the Court's construction of the Fourth Amendment any requirement that a search of a vehicle upon probable cause be supported by a search warrant. See Carroll v. United States, 267 U.S. 133 (1925); Husty v. United States, 282 U.S. 694 (1931); Brinegar v. United States, supra., 338 U.S. at 168; and Miles and Wafing, "The Automobile Search and the Fourth Amendment: A Troubled Relationship", 4 Seton Hall L. Rev. 105 (1972). In the prohibition cases, such as Carroll, Husty and Brinegar, it was the fleeting nature of the moving vehicle, and the necessity of searching the vehicle before an arrest could be effectuated, that represented an "exigent" circumstance justifying the immediate search upon probable cause. In Chambers v. Moroney, where the occupants of a car were arrested on the highway for robbery and the car towed to the police station and subsequently searched, it was also the potential mobility of the vehicle that the Court emphasized in upholding the warrantless search.

In Coolidge, the Court, in a plurality decision, established the principle that the mere fact that a vehicle is involved does not foreclose inquiry into the practicality of

obtaining a search warrant. In that case, the defendant's car was towed from his driveway and searched pursuant to a search warrant issued by the State Attorney General. Since the Court held the Attorney General not to be the "neutral and detached magistrate" that the Fourth Amendment requires, the Court held the search warrant invalid and treated the search as a warrantless search. 403 U.S. at 453. The Court observed that although the car was movable, the police had knowledge of probable cause to search it well before the actual time of its seizure, and thus should have obtained a valid search warrant. 403 U.S. at 460.

Of particular importance to the instant case was the Court's observation that at the time of the seizure, the Coolidge premises were completely secured by a police guard so that the vehicle and its contents were not subject to removal by the defendant or his allies. The Court stated:

> It is frequently said that occupied automobiles stopped on the open highway may be searched without a warrant because they are "mobile", or "movable." No other basis appears for MR. JUSTICE WHITE'S suggestion in his dissenting opinion that we should "treat searches of automobiles as we do the arrest of a person." Post, at 527. In this

> case, it is, of course, true that even though Coolidge was in jail, his wife was miles away in the company of two plainclothesmen, and the Coolidge property was under the guard of two other officers, the automobile was in a literal sense "mobile". A person who had the keys and could slip by the guard could drive it away. We attach no constitutional significance to this sort of mobility. (emphasis supplied) 403 U.S. at 461, 2.18.

In the case at bar the minimal inconvenience of assigning a police guard to the automobile for the time required to obtain a warrant would have neutralized the "mobility" of the vehicle so as to eliminate any legitimate interest on the part of the Agents in an immediate search.* Inasmuch as the Agents ignored this readily available method of safeguarding the evidence until a search warrant could be obtained, the warrantless search was unreasonable.

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* It might be argued that the defendants themselves might have returned to overpower the guard and remove the vehicle. However, if the vehicle had in fact been a plausible target for the defendants to recapture, it would have been sound police practice to "stake out" the vehicle precisely for the purpose of luring them back to the scene of the Hammer premises so that they could be apprehended. In either event, the constitutional right of privacy with respect to the vehicle would have been preserved without compromising police procedures.

In United States v. Bradshaw, 490 F. 2d 1097, 1103-1104 (5th Cir. 1974) the Court held unconstitutional a search of a truck for illegal alcohol located on the defendant's premises because the Treasury Department Agents failed to avail themselves of the opportunity to post a guard at the truck while they obtained a search warrant.

While the Supreme Court has suggested that persons have a lesser expectation of privacy with respect to cars than with respect to houses, see Cardwell v. Lewis, 42 U.S.L.W. 4929, 4930 (June 17, 1974) and Cady v. Dombrowsky, 412 U.S. 433, 442 (1973), the trunk of a car is unquestionably a zone of privacy that is protected by the Fourth Amendment:

> "This is not to say that no part of an automobile has Fourth Amendment protection; the exercise of a desire to be mobile does not, of course, waive one's right to be free of unreasonable government intrusion." Cardwell, supra at 4930. And see Note, 87 Harv. L. Rev. 835 (1974).

The decision in United States v. Ellis, 461 F. 2d 962, 966 (2d Cir.) cert. denied 409 U.S. 866 (1972) is distinguishable because it was conceded in that case that there was probable cause for the search, and further the Court found that a special police detail to guard the car would have been a drain on

police manpower. There was no such showing here. For the latter reason this Court reached a similar result in United States v. Carneglia, 468 F. 2d 1084, 1090 (2d Cir. 1972), cert. denied sub nom. Inzerillo v. United States, 410 F. 2d 945 (1973).

POINT IV

THE SEIZURE WAS IMPERMISSIBLY GENERAL

It was not disputed that the Agents had no probable cause to search the car for fruits, instrumentalities or evidence of the alleged crime, but only arguably for evidence as to the whereabouts of the defendants. Hence the seizure by Agent McMullen of all the papers he found in the car and trunk can be justified only by reference to the "plain sight" doctrine that an officer is entitled to seize articles that in the course of a lawful search he inadvertently comes upon and recognizes as fruits, instrumentalities or evidence of the crime. Ker v. California, 347 U.S. 23, 43 (1963); and Harris v. United States, 390 U.S. 234,236 (1965). The seizure conducted by Agent McMullen did not meet the standards of the "plain sight" doctrine, because Agent McMullen seized every paper and document he found in the car without considering whether or not it was connected to the alleged crime, observing only that a few of documents seemed possibly helpful in determining location or destination of the defendants.

In Coolidge, supra, the Court considered the question of whether the seizure of defendant's car was justified by the "plain sight" doctrine, and rejected such a proposed justification for the reason that the discovery of the car

by the police was not inadvertent, prior knowledge of the car and its contents having been available. In its analysis of the doctrine, the Court said:

> What the "plain view"cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification--whether it be a warrant for another object, hot pursuit, search incident to a lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused--and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the "plain view" doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges. Cf. Stanley v. Georgia, supra, at 571-572 (STEWART, J., concurring in result). 403 U.S. at 466-67 (emphasis supplied).

Agent McMullen testified that he gave no consideration to the possible connection of the items seized with the alleged crime. Indeed, he could not recall seeing any documents "emanating from a bank"--"The other material I didn't pay attention other than I was looking for specific locations, I just threw them in the envelope." (77a-78a).

Since it was not "immediately apparent" to Agent McMullen that the items had any evidentiary value, the seizure was unconstitutionally general. See also United States v. Smollar, 357 F. Supp. 628, 632 (S.D.N.Y. 1972), where Judge

Motley suggests that the "immediately apparent" language of Coolidge sets forth a standard more stringent than "probable cause" but falling short of "absolute certitude" with reference to articles inadvertently found in the course of a lawful search or intrusion on property; and see United States ex rel Nickens v. LaVallee, 391 F. 2d 123 (2d Cir. 1968); Marron v. United States, 275 U.S. 192, 196 (1927); Stanford v. Texas, 379 U.S. 476, 485 (1965).

POINT V

THE RECEIPT OF THE SEIZED DOCUMENTS IN EVIDENCE WAS REVERSIBLE ERROR

Since only two witnesses were able to connect the defendant directly with the offenses charged in the indictment and the bulk of the other witnesses identified only Nash or no one at all, it was of crucial importance for the Government to introduce the documents from defendant's automobile. These items connected him to the overall scheme in numerous prejudicial ways. Since the jury may well have entertained a reasonable doubt as to defendant's complicity based on the tenuous identification of Tattam and the peculiar events and conversations to which Cinammon and Tighe testified, the introduction of the seized documents constituted the most damaging piece of evidence against defendant. The seized items were particularly telling because of the lack of any handwriting or other scientific proof against him.

CONCLUSION

The judgment of conviction should be reversed and the case remanded for a new trial with a direction that all evidence seized from defendant's automobile and all leads derived therefrom be suppressed.

Respecfully submitted,

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